, 2005
CLERK

(3)

No. 04-1581

In The

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Brief Opposing Motion to Dismiss or Affirm

M. Miller Baker
Michael S. Nadel
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005-3096
202/756-8000
202/756-8087 (facsimile)
Counsel for Appellant WRTL

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Lead Counsel for WRTL

August 2005

Table of Contents

Argument 1

I. Whether *McConnell* Precluded All As-Applied Challenges Is a Substantial Question. 1

II. Whether a Grass-Roots Exception Should Be Recognized Is a Substantial Question. 8

Conclusion 10

Table of Authorities

Cases

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 2-4

Buckley v. Valeo, 424 U.S. 1 (1976) 5, 7

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 6

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 1, 5-7

Goland v. United States, 903 F.2d 1247 (9th Cir. 1990) 7

Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) 7

McConnell v. FEC, 540 U.S. 93, 209-11 (2003) ... *passim*

Constitution, Statutes, Regulations & Rules

2 U.S.C. § 431(17) 9

2 U.S.C. § 431(18) 9

2 U.S.C. § 434(f)(2)(E) 7

2 U.S.C. § 434(f)(3) 9

2 U.S.C. § 434(f)(3)(B)(iv) 1

2 U.S.C. § 441b(b)(2)(C) 9

U.S. Const. art. III 1, 2, 8

Other Authorities

67 Fed. Reg. 65203 1

FEC Advisory Opinion 2004-31 1

Argument

The case presents two substantial issues, and neither summary dismissal nor affirmance is appropriate.

I. Whether *McConnell* Precluded All As-Applied Challenges Is a Substantial Question.

The Federal Election Commission insists on having the exclusive right to consider and award or withhold as-applied exceptions to the electioneering communications prohibition. Although the FEC may consider as-applied challenges (by rulemaking and advisory opinions), it insists that an Article III court may not. And it insists that this incongruity raises no substantial question.

The FEC has authority to create additional exceptions, *as applied* to specific situations, to the electioneering communications prohibition by rulemaking. 2 U.S.C. § 434(f)(3)(B)(iv). It exercised that authority as applied to *MCFL*-type corporations, 67 Fed. Reg. 65203-07, 65211, over a year before this Court also decided that an exception was required as applied to the type of nonprofits identified in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 264 (1986) ("*MCFL*"). *McConnell v. FEC*, 540 U.S. 93, 209-11 (2003).

The FEC even considered an exception *as applied* to grass-roots lobbying, but decided erroneously that its authorizing statute prohibited the exception. *See Jurisdictional Statement* ("J.S.") at 24 n.22. But BCRA prime sponsors Sen. McCain et al. thought that the FEC had the authority to make such an exception, and that an as-applied exception was appropriate, and that the sponsors' proposed rule formulation was the correct one. *See* J.S. at 24 n.22, 28 & n.26.

And the FEC made an *as-applied* exception when it said that candidate Russ Darrow's name could be used in what were otherwise electioneering communications by the automobile dealerships bearing his name. FEC Advisory Opinion 2004-31; *See* J.S. at 2.

But the FEC says that an Article III court may not do the same. The FEC failed to explain such incongruity. And the FEC's current insistence is built upon its prior insistence in *McConnell* that as-applied challenges were the cure for perceived overbreadth. *See* J.S. at 11-12. Now it asserts the diametrically opposed position that the opportunity for such challenges is over, never to return, and the FEC has exclusive jurisdiction over as-applied questions. The FEC can't have it both ways.

The FEC failed to respond to the argument that Article III prohibits such claim preclusion. *See* J.S. at 8-9. Or to the argument that this Court's Article III and prudential tenets preclude such preclusion. *See* J.S. at 8-11. Or to the argument that *McConnell* reaffirmed such tenets. *See* J.S. at 9-11. Or to the argument that *McConnell*'s reliance on *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for its substantial overbreadth analysis necessarily embraced *Broadrick*'s pronouncement that where a facial challenge fails the remaining overbreadth is cured by as-applied analysis. *See* J.S. at 8-9. So what did the FEC rely upon? It is summed up in the following passage:

> While acknowledging that BCRA § 203 might encompass some such advertisements ["that are not intended to influence federal elections"], the Court squarely held that the provision is constitutional in *all* its applications. . . . [T]he Court recognized that BCRA § 203 imposes only a modest burden . . . and [a] bright-line rule was essential . . . . [*Motion* at 11 (italics in original).][1]

---

[1]The FEC conceded in its *Motion* that it argued in *McConnell* that lack of narrow tailoring "could be addressed on an as-applied basis." *Motion* at 13 n.2. But it tried to dodge this by arguing that "[t]he principal thrust . . . was . . . the importance of the governmental interests . . . and the minimal nature of the burdens . . . ." *Id.* These arguments are not persuasive, as shall be shown, but they also have nothing to do with the necessity of as-applied challenges.

These three assertions are dealt with under these headings: (1) "all its applications," (2) "modest burden," (3) "bright-line rule."

"All its applications." The FEC continues to argue that *McConnell* footnote 73's "all applications" comment refers to all future as-applied challenges to the electioneering communication prohibition instead of all applications of the definition in the statute and fails to respond to the plain-sense explanation of this footnote already made. *See* J.S. at 22. The FEC also argues that the Court's cross reference in a discussion of another BCRA provision (Title V, not Title II), *McConnell*, 540 U.S. at 239, supports its assertion that all future as-applied challenges are precluded, failing to respond to Appellant's plain-sense explanation of this passage. *See* J.S. at 22-24. Finally, the FEC continues to urge that *McConnell*'s "in the future" statement, *id.* at 206, means that all as-applied challenges are barred, again failing to come to grips with the plain explanation of this passage as addressing the substantiality immediately at issue in its *Broadrick* overbreadth analysis. *See* J.S. at 19-22.

Of course, this appeal provides this Court the opportunity to say definitively what it meant by these passages, but the FEC has not made its case that these passages preclude all as-applied challenges, in all situations, by all parties, for all time. And the explanations in the *Jurisdictional Statement* clearly demonstrate not only that these three *McConnell* passages are explainable in other ways but that the text, reason, and precedent compel a different reading.

In support of its all-applications-upheld argument, the FEC next attempted to appeal to the "broader context of the Court's decision." *Motion* at 12. Here the FEC conceded that the *McConnell* "parties," including the FEC, "recognized that BCRA's primary definition of 'electioneering communication' encompasses at least some advertisements that are not intended to influence federal elections." *Motion* at 12. The FEC asserted that the *McConnell* plaintiffs dealt with

the conceded overbreadth by arguing that it was "a sufficiently large percentage" that the statute must be struck facially, but that the "[t]he statute's defenders . . . argued that plaintiffs' overbreadth challenge should be rejected because 'BCRA's primary definition of "electioneering communications" is narrowly tailored to advance several different compelling government interests . . . and . . . impose[s] only minimal burdens . . . .'" *Motion* at 13.

The FEC fails to understand the difference between facial substantial overbreadth analysis (as employed in *Broadrick*, 413 U.S. 601) and strict scrutiny narrow-tailoring analysis. The *Jurisdictional Statement* dealt at length with (a) the difference between substantial-overbreadth facial analysis and narrow tailoring, (b) how the *McConnell* parties argued both substantial overbreadth and narrow tailoring, and (c) this Court's employment of *Broadrick*-style analysis to decide the *McConnell* facial challenge, J.S. at 11-22, which needs no repetition. So the FEC's assertion that "[t]his Court's categorical rejection of the plaintiff's overbreadth challenge . . . precludes appellants's current [as-applied challenge]," *Motion* at 13, is flatly wrong. *Broadrick* said plainly that if an overbreadth facial invalidation of a statute is denied then "whatever overbreadth may exist should be cured through *case-by-case* analysis . . . ." 413 U.S. at 615-16 (1973) (emphasis added).[2]

On the basis of its flawed understanding and argument, the FEC asserts that "[t]here is consequently no basis for appellant's contention that . . . *McConnell* 'acknowledge[d] that *some* issue ads may not be constitutionally regulated' by Congress." *Motion* at 14. Appellant's statement followed its argument that this Court's use of *Broadrick*-style facial overbreadth analysis necessarily left open case-by-case analysis for those ads that *McConnell* indicated were not

---

[2]The FEC also argued that this Court did not give permission for this as-applied challenge in *McConnell*, *Motion* at 13, but this argument has already been addressed by unrebutted counter argument. J.S. at 24 n.22.

included in "the vast majority" of "electioneering communications." *See* J.S. at 11-17 Prohibition of this "vast majority" was justified because the communications were the "functional equivalent[s] of express advocacy." 540 U.S. at 206. If the "vast majority" was so justified, then the Court had plainly said that the minority was not so justified. This means that this minority may be the subject of as-applied challenges. The Court said this expressly: "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U.S. at 206 & n.88. *See* J.S. at 17-22. The FEC's reliance on this Court's statement that "in the future" the electioneering communication prohibition could be avoided or "in doubtful cases" funded with PAC money has been answered at length in the *Jurisdictional Statement*. *See* J.S. 18 & n.20, 19-22. The FEC made no effort to respond to these arguments.[3] This leaves case-by-case analysis as the solution for the lack of narrow tailoring recognized but not dealt with in *McConnell*.

"Modest Burden." The FEC concedes that corporations may engage in lobbying, but argues that the electioneering communication prohibition and dismissal of this case do not "reflect[] the view that regulation of corporate issue advocacy is desirable for its own sake." *Motion* at 17-18. According to the FEC, the burden on lobbying is just an "incidental byproduct" of the prohibition, imposing only a "marginal impact." *Id.* at 18. But if mere "compelled *disclosure*, in itself, can *seriously* infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (emphasis added), then a fortiori a *prohibition* is a serious burden. What this Court said of the requirement that independent expenditures be made through a PAC, in another as-applied case, applies here: "While the burden on MCFL's speech is not insur-

---

[3]The FEC failed to address the clear distinction between "sham ads" and genuine issue ads described in *McConnell*, and the significance of that distinction for the present case. *See* J.S. at 16 & n.18.

mountable, we cannot permit it to be imposed without a constitutionally adequate justification." *MCFL*, 479 U.S. at 263. On the facts of this case, Appellant did not have PAC money enough to do the desired communications and raising sufficient PAC funds, if it had been possible, would have taken too long, J.S. at 6-7, so the prohibition in fact halted the ads that had been running. J.S. at 5. That is a serious burden. But more to the present point, a "modest burden" argument says nothing to whether as-applied challenges are allowed, and it says nothing to this case, which alleges that the burden isn't modest as applied.

"Bright-Line Rule." The FEC argues that permitting as-applied challenges would "undermine Congress's effort to develop an objective bright-line rule," *Motion* at 14, but it fails to respond to the answers already given, *see* J.S. at 30, which are (1) *MCFL*'s holding that the "desire for a bright line rule hardly constitutes the compelling state . . . necessary to justify any infringement on First Amendment freedom," 479 U.S. at 263, and (2) that a very bright line is proposed in this case, J.S. at 28, 30, one that is as bright as the *MCFL*-type corporation line established by this Court. *Id.* at 263-64.[4]

The FEC tries to take the Court's eyes off the proposed bright line, J.S. at 28, by pointing to the sixteen factors, J.S.

---

[4]The FEC alleges that the *MCFL*-type corporation rule is a bright line while the proposed rule herein "would enmesh the courts in formless inquiries into the purposes of individual disbursements and the content of specific communications." *Motion* at 16 n.3. There has, of course, been litigation over the scope of the *MCFL* exception, *see, e.g., Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994), so fact-sensitive constitutional analysis is appropriate even with an admittedly bright line. The FEC's assertion is clearly based on its attempt (discussed below) to substitute a non-bright test for the one appellant actually proposes, which is as bright as *MCFL*'s. And the proposed test nowhere requires inquiry into "the purposes of individual disbursements." Not even BCRA's prime sponsors thought "purpose" was an appropriate part of a bright-line rule permitting authentic grass-roots lobbying. *See* J.S. at 28 & n.26.

at 5-6, that demonstrate that the proposed advertisements herein are authentic grass-roots lobbying and not electioneering, wrongly claiming that "[a]ppellant does not make clear whether it views all 16 factors as necessary . . . ." *Motion* at 15. Appellant plainly said that "[e]ither the broadcast communications proposed on the facts of this case [16 factors] or the carefully-defined distillation of them into the *proposed bright-line rule* just set out eliminates the concerns recognized by this Court as justifying the prohibition." J.S. at 29 (emphasis added). This as-applied challenge does not "reintroduce . . . indeterminacy," *Motion* at 15, but even if it did, constitutionally protected rights come first. *MCFL*, 479 U.S. at 263.[5]

The FEC still has not provided any precedent for the proposition that one facial decision may preclude *all* future applied challenges, although it makes its best effort by citing *Goland v. United States*, 903 F.2d 1247, 1258-59 (9th Cir. 1990). *Motion* at 16-17 & n.4. Space limitations preclude listing the several distinctions between *Goland* and the present case,[6] but a key quotation resolves its non-application to the present issue: "The issues Goland raises were resolved by the Court in *Buckley*, and no feature of his admittedly distinctive factual situation distinguishes his case." 903 F.2d at 1258. Simply put, if his factual situation *had* distinguished his case, his case would not have been

---

[5]The FEC failed completely to respond to "the option of using only funds from a "separate bank account" to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E), [which] would eliminate even more concerns, if necessary." J.S. at 29.

[6]For example, Goland argued that the contribution limit was unconstitutional as applied to him because it inhibited his ability to make an *illegal* anonymous contribution. 903 F.2d at 1259. And *Goland* is a contributions limit case for which a lower standard of review applies, *Buckley*, 424 U.S. at 25, just as *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981), was decided under the even lower reasonable time, place, and manner standard. Citing these cases in the present strict scrutiny context is mixing apples and oranges.

dismissed. *Goland* did not say that all as-applied challenges to contribution limits were precluded by *Buckley*'s facial upholding of contribution limits. It provides no support for the notion that a facial decision may preclude all future as-applied challenges.

In sum, the FEC argued not for a bright line rule per se (which is maintained in the proposed rule distilled from the facts) but for one bright line over another—the one that gives the FEC the exclusive jurisdiction to consider as-applied exceptions and shuts out Article III courts.

II. Whether a Grass-Roots Exception Should Be Recognized Is a Substantial Question.

The FEC's sole argument against an exception as applied to grass-roots lobbying in general was its bright-line argument that has already been discussed and rejected in Section I. *Supra*. The FEC notably failed to show the insufficiency of (or even address) the proposed bright-line rule to identify authentic grass-roots lobbying, which rule was adapted from the proposal by BCRA's prime sponsors. *See* J.S. at 28. And the FEC failed to respond to the demonstration of all the sorts of ads that this rule would eliminate, making such communications "of little or no value for the purposes of opposing/supporting candidates, [although they are] essential to self government." J.S. at 29.

As applied to appellant's three specific proposed ads, the FEC failed to substantively address the 16 identified factors demonstrating that the proposed ads were authentic grass-roots lobbying and not electioneering. No flaw was identified with the argument that such ads with such characteristics pose no threat to the electoral system and are essential to self-government.

Instead, the FEC focused on matters that may not fairly be considered in an attempt to establish the "inference that [the ads] were in the heartland of Congress's concerns." *Motion* at 20. First, the FEC argued that statements made by an appellant's PAC may be attributed to the corporation. *Motion* at 19. The FEC failed to show any precedent (or

statute) allowing attribution of things done by a corporation's PAC to the corporation itself. In fact, it is contrary to clearly-established law, which defines both independent expenditures and electioneering communications based on what the communication itself says, not on what else an organization does.[7]

Second, the FEC argued that there is no evidence that the three proposed advertisements were run after the November elections. As noted in footnote 7 below, this is not a proper question for determining whether a communication is either an express advocacy communication or an electioneering communication as the equivalent of express advocacy. It is also beyond the record of this case. And it has no bearing on appellant's asserted desire to make such communications in the future on the basis of a proposed bright-line exception for genuine grass-roots lobbying.

The FEC has studiously avoided coming to grips with the need for a genuine grass-roots lobbying exception. This demonstrates a hostility to the needs of the people for this vital tool of self-governance. As established in the *Jurisdictional Statement*, Judge Leon in *McConnell* perceived the

---

[7]Whether a communication constitutes an independent expenditure turns solely on whether the communication *itself* contains explicit words expressly advocating a clearly identified candidate's election or defeat. 2 U.S.C. § 431(17), (18). The corporate prohibition expressly *excludes* any consideration of PAC activity in determining whether a corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)). "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3). Nowhere in the definition is there any instruction to see whether the organization's PAC said anything. Even the grass roots lobbying exception proposed by BCRA's prime sponsors, J.S. at 28, did not include any examination of what a group's PAC had done. Rather the proposed exception looked solely at the words of the communication itself, examining only the "four corners" of its transcript. That is the required approach.

necessity for genuine grass-roots lobbying and saw it as different in kind from the sort of sham issue ads at issue in that case. *See* J.S. at 25-27 & n.25. This Court likewise distinguished lobbying from sham issue advocacy. J.S. at 27. There is no principled reason to deprive the people of their freedom to speak, associate, and petition through their citizen advocacy groups when vital legislative (and executive) branch actions are being decided by the people's representatives in proximity to elections when there is a readily-available bright-line rule to distinguish authentic from sham. *See* J.S. at 28.

Conclusion

For the reasons stated herein and in the *Jurisdictional Statement*, the Court should deny the *Motion to Dismiss or Affirm*. Rather, the Court should note probable jurisdiction. Alternatively, the Court should summarily reverse the district court's dismissal and remand this case with instructions to expeditiously decide the already briefed cross-motions for summary judgment.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
Lead Counsel for WRTL

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005
202/756-8000
Counsel for WRTL